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Supreme Court, U.S.
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CASE NO.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

PLATINUM FINANCIAL SERVICES CORP., JAVITCH, BLOCK & RATHBONE, LLP & NENA PAVLOVIC,
Petitioners,

V.

HERBERT DELAWDER,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Court of Appeals have jurisdiction under the collateral order doctrine, over the interlocutory appeal of the district court's order denying a motion to dismiss an action brought under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(2), 1692e(10), 1692f(1), and the Ohio Consumer Sales Practices Act, R.C. § 1345.02(B)(10), predicated on the common law absolute privilege and absolute immunity afforded to counsel and participants in the judicial process for pertinent statements made in the course of judicial proceedings?

2. Does the common law absolute privilege and absolute immunity from suit afforded to necessary participants in the judicial process, for pertinent statements made in the course of judicial proceedings, bar an action against a private lawyer and debt collector based on the content of an unsuccessful state court pleading and affidavit attached thereto, alleged to violate 15 U.S.C. §§ 1692e(2), 1692e(10), and 1692f(1) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a et seq., and the Ohio Consumer Sales Practices Act, Ohio R.C. § 1345.02(B)(10)?

PARTIES TO THE PROCEEDINGS & CORPORATE DISCLOSURE STATEMENT

Petitioners Platinum Financial Services Corporation, Javitch, Block & Rathbone, LLP, and Nena Pavlovic, were the defendants and the appellants in the proceedings below.

Respondent Herbert Delawder was the plaintiff and appellee below.

Pursuant to Rule 29.6, there is no parent or publicly held company owning 10% or more of the corporation's stock, in Platinum Financial Services Corporation, or Javitch, Block and Rathbone, LLP.

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PETITION FOR WRIT OF CERTIORARI

Platinum Financial Services Corp. ("Platinum"), Javitch, Block & Rathbone, LLP ("JB&R") and Nena Pavlovic respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

This Petition arises from the denial of a motion to dismiss an action brought under the Fair Debt Collection Practices Act (FDCPA), and the Ohio Consumer Sales Practices Act (Ohio CSPA) premised on the content of a state court complaint and affidavit filed by the Petitioners against the Respondent. Petitioners claim that the common law afforded necessary participants in the judicial process, including counsel and parties, with an absolute privilege and absolute immunity for pertinent statements made in the course of judicial proceedings. The absolute privilege barred tort claims centered on the content of pleadings including defamation, invasion of privacy, deceit, and emotional distress. As such, the content of state court pleadings are not actionable at all under the FDCPA or the Ohio CSPA, to the extent the closest analogous tort claim would have been barred by the absolute privilege. If actionable at all, however, Petitioners contend a restricted reading of the FDCPA and the Ohio CSPA is compelled by the Right to Petition, *Noerr-Pennington* doctrine, and the Commerce Clause, such that to be actionable, the pleadings must be both objectively baseless and subjectively motivated by an improper purpose. The Sixth Circuit dismissed Petitioners' interlocutory appeal for lack of jurisdiction, declined to exercise mandamus jurisdiction, and denied Petitioners' Petition for Rehearing and Suggestion of Rehearing En Banc.

The Court of Appeals, referring to the common law immunity afforded to counsel and parties for pertinent statements made in the course of judicial proceedings as

"advocacy immunity", declined to recognize the absolute nature of the immunity, its importance as a right not to stand trial, the historical and reasoned basis for the absolute immunity afforded to participants in the judicial process, or the substantial public interests promoted by permitting interlocutory review. In so ruling, the Court of Appeals placed itself in conflict with published decisions of the Second, Fourth, Fifth, and Tenth Circuit Courts of Appeals, each of which have entertained collateral order jurisdiction over comparable claims of absolute privilege asserted by private parties as a bar to comparable state tort claims.

The decision relied on *Kelly v. Great Seneca Financial Corp.*, 447 F.3d. 944, 949-51 (6th Cir. 2006), cert. pending case no. 06-554, which establishes a "high order", "substantial public interest" requirement that can never be met by any private parties, thereby misreading this Court's recent decision in *Will v. Hallock*, and foreclosing collateral order appeals by private parties under a claim premised on the common law immunity afforded to participants in the judicial process.

Review of the issue presented is particularly warranted in this case because courts have been reading and applying the Fair Debt Collection Practices Act in ways this Court presaged, in *Heintz v. Jenkins*, courts were unlikely to endorse. *Heintz v. Jenkins*, 514 U.S. 291 (1995). See (Pet. App. 13-14).

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1) is unreported. The opinion of the district court (Pet. App. 6-27) is reported at 443 F.Supp.2d 942.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on June 19, 2006. Petitioners timely filed their

Petition for Rehearing & Suggestion for Rehearing En Banc on June 23, 2006. The Sixth Circuit denied rehearing and rehearing en banc October 2, 2006. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). This Petition is timely pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1291 (Pet. App. 36), 15 U.S.C. § 1692e (Pet. App. 32-34),15 U.S.C. § 1692f (Pet. App. 34-35) and Ohio Rev. Code § 1345.02(B)(10).

STATEMENT OF THE CASE

1. On October 1, 2003, Petitioners filed a lawsuit in the Ironton Municipal Court, Ironton, Ohio against Respondent seeking to collect on a debt owed to Platinum in the amount of $5,355.60 (hereinafter referred to as the "Ironton Case" or "Ironton Complaint"). (Pet. App. 7). Attached to the Ironton Complaint as Exhibit A, was an affidavit in support of judgment, which included the account number (xxxxxxxxxxxx5326), a past due amount of $5,355.60. (Pet. App. 7). Defendants dismissed the Ironton Case voluntarily prior to responding to discovery requests. (Pet. App. 7). The voluntary dismissal was at Platinum's costs, without prejudice. (Pet. App. 7).

Respondent, Herbert Delawder, commenced this action against Petitioners Platinum Financial Services Corp. ("Platinum"), the law firm of Javitch, Block & Rathbone, LLP ("JB&R") and one of its attorneys, Nena Pavlovic, on September 30, 2004 in the U.S. District Court for the Southern District of Ohio. The complaint alleged that the content of the Ironton complaint and its attached affidavit violated 15 U.S.C. §§ 1692d, 1692e(2), 1692e(5), 1692e(10), and 1692f(1) of the FDCPA and Ohio CSPA §§ 1345.02 and 1345.03. The complaint asserted jurisdiction pursuant to 15

U.S.C. § 1640(e), 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1337 as well as supplemental or pendent jurisdiction over the Ohio CSPA claims. (Pet. App. 7, 8, 13-16, 22-25). The complaint alleged that the Ironton complaint sought more money than Platinum was entitled to collect; that no means existed to prove that the debt was owed; that no account statement was attached to the complaint as required by Ohio Civ. R. 10; that the attachment, an affidavit, was 'bogus' as it contained "false and frivolous assertions concerning the records that are allegedly maintained as well as the manner in which those account records are kept." (Pet. App. 13-16).

Respondent alleged the Ironton Complaint and its affidavit, violated five specific provisions of the FDCPA: 15 U.S.C. § 1692e(2) (falsely representing the character, amount or legal status of a debt or the compensation which may be recovered in connection with the collection of a debt), 15 U.S.C. § 1692d (engaging in conduct which had the natural consequence of harassing, oppressing, or abusing plaintiff in connection with the collection of a debt), 15 U.S.C. § 1692f(1) (attempting the collection of any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law), 15 U.S.C. § 1692e(5) (threatening to take any action that cannot legally be taken or that is not intended to be taken), and 15 U.S.C. § 1692e(10) (generally using a false representation or deceptive means to collect a debt). Respondent's Complaint further alleged the same conduct also violated four provisions of the Ohio Consumer Sales Practices Act (Ohio CSPA): R.C. § 1345.02(B)(1) (misrepresenting that the subject of a consumer transaction had sponsorship, approval, performance, characteristics, accessories, uses, or benefits that it did not have); R.C. § 1345.02(B)(9) (misrepresenting that it had sponsorship, approval or affiliation that it did not have); R.C. § 1345.02(B)(10) (falsely misrepresenting the rights, obligations and remedies that the Plaintiff had under law); and R.C. § 1345.03(B)(6) (knowingly making

misstatements of opinion in connection with the collection of a debt). (Pet. App. 13-16, 22-25).

Petitioners argued below for dismissal because: (a) Defendants possessed common law immunity from suit for statements made in the course of judicial proceedings; (b) the common law privilege defines the First Amendment's Right to Petition and barred Plaintiff's claims; (c) construing the FDCPA to apply in the context of statements made in the course of state court judicial proceedings would render the statute void for vagueness and overbreadth under the First Amendment and exceed Congress' powers under the Commerce Clause and the Tenth Amendment; (d) *Heintz v. Jenkins*, 514 U.S. 291 (1995), did not foreclose the assertion of immunity; (e) under the functional test for a claim of immunity, the court was required to look to: (i) common law to determine how courts dealt with closely analogous torts, for a guide to aid its interpretation of the Act; (ii) the legislative history of the FDCPA does not reveal an intent by Congress to deprive creditors or their attorneys of the immunity defenses enjoyed at common law for participation in the judicial process; and (iii) safeguards in place to prevent an abuse of the claimed immunity. (Pet. App. 16-22). Petitioners further argued that Plaintiff's Ohio CSPA claims were barred by state law immunity under the common law of Ohio and the Ohio Constitution's Petition and Speech clauses. (Pet. App. 22-26).

The District Court granted in part and denied in part Petitioners' Motion to Dismiss. (Pet. App. 26-27). The Court first determined that *Heintz v. Jenkins*, properly read, extends the FDCPA so that "Defendants can be held liable for all litigation conduct including the filing of the Ironton complaint, if that conduct violates the FDCPA." (Pet. App. 12-13). The Court also held that Respondent's Complaint stated claims under 15 U.S.C. § 1692e(2), (Pet. App. 13-14); § 1692f(1), (Pet. App. 14) and § 1692e(10), (Pet. App. 15);

but that the Complaint did not state claims under § 1692e(5) or § 1692d. (Pet. App. 14-16). The Court also held Respondent failed to state claims under R.C. § 1345.02(B)(1), (B)(6), and (B)(9), but found that Respondent stated a claim under R.C. § 1345.02(B)(10). (Pet. App. 23-25). The Court rejected the notion that a restricted reading of the FDCPA was compelled by First Amendment or the Commerce Clause, as other courts had imposed liability for the content of pleadings, citing *Conner v. Howe*, 344 F. Supp.2d 1164, 1172-73 (S.D. Ind. 2004) and *Miller v. Wolpoff & Abramson*, 321 F.3d 292, 308 (2d Cir. 2003). (Pet. App. 25-26).

2. As to the common law privilege and immunity afforded to necessary participants in the judicial process, the Court referred to two of its prior opinions, holding that "neither the doctrine of witness immunity nor the litigation privilege barred actions under the FDCPA for statements made in litigation proceedings attempting to collect a debt." (Pet. App. 16-19). The Court observed that "[g]iven the broad drafting of the FDCPA and Congress' repeal of the attorney exemption, the Court is not persuaded that Congress intended to incorporate common law immunity into the FDCPA for Defendants' alleged behavior." (Pet. App. 18-19). The Court dispensed with Petitioners claims of immunity, by holding that "[a]pplying any of these immunity doctrines to bar Delawder's claim under the FDCPA would be contrary to the FDCPA's statutory purpose." (Pet. App. 19). As to the First Amendment, the Court held: "even if immunity under the right to petition could be extended to complaints under the FDCPA, it would not provide immunity for the conduct alleged here, that is the filing of a complaint knowing that it was unfounded." (Pet. App. 19).

3. As to the Ohio CSPA claims, the Court held that Ohio law does afford an absolute privilege to defamation and libel claims, but that the Respondent's claims under the Ohio CSPA were not analogous and further predicted that Ohio

Courts would not apply the privilege as a bar to claims under the Ohio CSPA. (Pet. App. 25-26).

4. Petitioners filed a notice of appeal seeking collateral order review under 28 U.S.C. § 1291. The Court of Appeals declined to exercise jurisdiction to review the district court order. Following *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944 (6th Cir. 2006), the Sixth Circuit held collateral order jurisdiction did not support review of an order denying a claim of absolute immunity afforded by the common law to advocates and parties to judicial proceedings. (Pet. App. 2-5).

REASONS FOR GRANTING THE PETITION

I. Review is required because the decision conflicts with relevant decisions of this Court; it is contrary to published decisions of the Circuits, and the decision below raises important questions of first impression that should be settled by this Court.

(A). Petitioners argue that their claim of immunity, conclusively rejected by the district Court, is premised on a right not to stand trial, and is effectively unreviewable after final judgment. The collateral order doctrine, recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), permits interlocutory appeal from an order that constitutes a conclusive determination of a disputed issue, completely separate from the merits of the action, when the order is not effectively reviewable on appeal from a final judgment. *Will v. Hallock*, __ U.S. __, 126 S.Ct. 952, 957, 959 (2006) (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978))). The collateral order doctrine "accommodates a

"small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable from, and collateral to, rights asserted in the action[,]" that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) & *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

The class of orders that are immediately appealable include orders rejecting absolute immunity, qualified immunity, Eleventh Amendment Immunity and adverse rulings on a defense of double jeopardy. *Id.* (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 742, (1982), *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) & *Abney v. United States*, 431 U.S. 651, 660 (1977)).

The Sixth Circuit decision below adhered to the holding in *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944 (6th Cir. 2006), which determined that *Will v. Hallock* did not support collateral order review of all claims of absolute immunity, "regardless of the function that the litigant served." *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944, 948. Additionally, the Court in *Kelly* read *Will* to require that a claimant asserting absolute immunity must also demonstrate the functional imperilment of a substantial public interest, independent from the purpose underlying the claim of immunity. The Court in *Kelly* observed official, sovereign and Presidential immunity lead to distinct injuries, apart from the right not to stand trial, which could not be shown by private litigants claiming immunity. *Kelly*, 447 F.3d 944, 949. Citing distraction from performing official duties, indecisiveness by public officials and cost to the public fisc as examples, the Court held witness immunity "protects no substantial public interest of a comparable 'high order' as those identified in *Will*." *Id.* Regarding the immunity afforded by the common law to advocates and

parties to judicial proceedings, the Court first observed it was never regarded as a right not to stand trial. *Id.* at 949-50. Further, the Court, assuming arguendo that the common law did afford advocates and parties a right not to stand trial, held that the interest in such an appeal was not of a "comparable 'high order'" to the interests identified in *Will*. *Id.* at 950-51. The Court also held that private parties could not demonstrate how denying an immediate appeal would imperil a substantial public interest. *Id.* at 950. As the Court in *Kelly* held that advocacy immunity did not support collateral order jurisdiction, the decision below followed *Kelly* in holding that the Court lacked interlocutory appellate jurisdiction over Petitioners' appeal. (Pet. App. 4).

Justice Kennedy's concurring opinion in *Wyatt v. Cole* recognized that private parties have a right of appeal from a denial of a claim of absolute immunity. *Wyatt v. Cole*, 504 U.S. 158, 173 (1992). See also *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) ("When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'"). The common law absolute immunity afforded to participants in the judicial process is embodied in the Petition Clause of the First Amendment, and arguably enjoys constitutional protection. See e.g., *McDonald v. Smith*, 472 U.S. 479, 484 (1985); *J & J Const. Co. v. Bricklayers and Allied Craftsmen, Local 1*, 468 Mich. 722, 735-55, 755-62, 664 N.W.2d 728 (2003) (Young, J., concurring) (Right to Petition embodies absolute immunity when premised on petitions filed in judicial proceeding).

1. At common law, tort claims were historically barred when based on the content of pleadings filed in court. At common law, lawyers and parties seeking redress in a judicial proceeding possessed an absolute privilege and absolute immunity concerning statements which are reasonably related

to and made in the course of judicial proceedings, and were absolutely immune from suit for tort claims which are based on such statements. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993); *Burns v. Reed*, 500 U.S. 478, 490 (1991) (quoting *King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772)); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Briscoe v. LaHue*, 460 U.S. 325, 330-331, 334 (1983); *Bradley v. Fisher*, 13 Wall. 335, 351 (1871); *Surace v. Wuliger*, 25 Ohio St.3d 229, 235, 495 N.E.2d 939, 944 (1986) ; *Hastings v. Lusk*, 22 Wend. 410 (N.Y. 1839); *Mayrant v Richardson*, 1 Nott & McC. 347, 10 S.C.L. 347, 1818 Westlaw 915 (S.C. 1818); *Harris v Reams*, 2 Ohio Dec. Rep. 281, 1860 Westlaw 3926 (Logan Co. 1860); *Hoar v. Wood*, 3 Met. 193, 197-198, 44 Mass. 193, 1841 Westlaw 3465 (1841); *Swearingen v. Birch*, 4 Yeats 322 (Pa. 1806); *Harris v Huntington*, 4 Am.Dec. 728, 2 Tyl. 129, 1802 Westlaw 777 (Vt. 1802); Edward P. Weeks, Treatise on Attorneys & Counsellors at Law, §§ 106, 110, pp. 196-98, 205-210 (Fred B. Rothman & Co. 1997) (1878) (citing *Brook v. Montague*, 2 Cro. Jac. 90 (1606); *Hodgson v. Scarlet*, 1 B. & Al. 232); Sack on Defamation, §§ 8.2.1-8.2.1.6 (2004); T.L. Anenson, *Absolute Immunity From Civil Liability: Lessons For Litigation Lawyers*, 31 Pepp. L. Rev. 915, 918-919 (2004) [hereinafter, referred to as Anenson, *Lessons*]; J. M. Spanbauer, *The First Amendment Right To Petition Government For A Redress Of Grievances: Cut From A Different Cloth*, 1 Hastings Const. L.Q. 15, 22-25, 52-57 (1993) [hereinafter referred to as Spanbauer, *Right to Petition*]; Restatement (Third) of the Law Governing Lawyers § 57; Restatement (Second) of Torts §§ 586, 587, 588 (1977).

As an absolute privilege, tort claims cannot be premised on the content of statements made in judicial proceedings, and attorneys and parties are absolutely immune from suit for such claims, which is a right not to stand trial:

> In reality these "absolute privileges" are properly to be classified as immunities, since they are based upon the personal position or status of the actor. . . . . These "absolute privileges" are based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests. To accomplish this, it is necessary for them to be protected not only from civil liability but also from the danger of even an unsuccessful civil action. To this end, it is necessary that the propriety of their conduct not be inquired into indirectly by either court or jury in civil proceedings brought against them for misconduct in their position. Therefore the privilege, or immunity, is absolute and the protection that it affords is complete. It is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the actor.

Restatement (Second) Torts Division 5, Chapter 25, Topic 2, Title B, Comment (1977). See also Restatement (Second) of Torts § 10(2)(c)(1977); *Boice v. Unisys Corp.*, 50 F.3d 1145, 1148 (2d Cir. 1995); *Imbler v. Pachtman*, 424 U.S. 409, 426, n. 23 (1976) ("a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well."); *Burns v. Reed*, 500 U.S. 478, 490 (1991) (quoting *King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772)); *Briscoe v. LaHue*, 460 U.S. 325, 330-331, 334 (1983); *Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."); *Surace v. Wuliger*, 25 Ohio St.3d 229, 235, 495 N.E.2d 939, 944 (1986); Sack on Defamation, §§ 8.2.1-8.2.1.6 (2004);

Restatement (Third) of the Law Governing Lawyers § 57; Restatement (Second) of Torts §§ 586, 587, 588 (1977).

The absolute immunity from suit deriving from this privilege was an outgrowth of several historical sources, including the right of citizens to petition for redress of grievances, ensuring access to courts, the right to counsel, and the fair and proper administration of justice. See Anenson, *Lessons,* 31 Pep. L. Rev. 915, 919-24; Spanbauer, *Right to Petition*, 1 Hastings Const. L.Q. 15, 52-57; Weeks, *supra.* It has been justified as a necessary price to pay for the fair administration of justice. See *Abbot v. National Bank of Commerce*, 175 U.S. 409, 411, 20 S.Ct. 153, 154 (1899); *Bradley v. Fisher*, 13 Wall. 335, 351; Spanbauer, *Right to Petition*, supra; Anenson, *Lessons,* supra; *White v. Nicholls*, 44 U.S. 266, 280 (1845); *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (White, J., concurring); *Butz v. Economou*, 438 U.S. 478, 512 (1978).

2. Claims of absolute immunity by non-governmental litigants premised on the common law absolute privilege and absolute immunity for pertinent statements made in the course of judicial proceedings fall within the collateral order doctrine because they satisfy each prong of the three-prong *Cohen* test. *Robinson v. Volkswagenwerk AG,* 940 F.2d 1369 (10th Cir. 1991); *Shanks v. Allied Signal,* 169 F.3d 988 (5th Cir. 1999); *Smith v. McDonald,* 737 F.2d 427 (4th Cir. 1984), aff'd. *McDonald v. Smith*, 472 U.S. 479 (1985); *Boice v. Uñisys Corp.*, 50 F.3d 1145, 1148 (2d Cir. 1995). As such, the Sixth Circuit decision conflicts with published decisions of the Second, Fourth, Fifth, and Tenth Circuit Courts of Appeals, which have exercised collateral order jurisdiction over claims of absolute immunity asserted by private parties as a bar to comparable tort claims.

In *Robinson v. Volkswagenwerk AG,* 940 F.2d 1369, 1370 (10th Cir. 1991), the Tenth Circuit entertained a

collateral order appeal from the denial of a motion to dismiss or summary judgment in a diversity action brought against, among others, Herzfeld & Rubin, P.C. ("H&R"). The plaintiffs claimed H&R was liable for fraudulent statements made in the course of discovery in connection with prior litigation. 940 F.2d 1369, 1373-74. H&R claimed that absolute immunity was afforded at common law to private lawyers for statements made in the course of judicial proceedings. 940 F.2d at 1370. Finding no common law predicate that afforded private lawyers with absolute immunity from claims of fraud, the Tenth Circuit affirmed the denial of absolute immunity, noting however, that this Court's immunity case law supported absolute immunity for defamation claims brought against private lawyers.

In *Shanks v. Allied Signal*, 169 F.3d 988, 992 (5th Cir. 1999), the plaintiff, an air mechanic, alleged that Allied Signal, a designated party to an airplane crash investigation undertaken by the NTSB, had conspired to manipulate the investigation and provided false and misleading information to the NTSB, all of which led to a false accident report and criminal charges against him. 169 F.3d 988, 990-91. Shanks diversity action alleged Allied committed various torts; Allied argued that it was immune from tort liability under the common law of Texas, which afforded an absolute privilege for statements made in the course of judicial, quasi-judicial or legislative proceedings. Recognizing that the privilege was more properly characterized as a form of absolute immunity, the Court observed that the immunity "was not a mere defense, and that such communications were not actionable at all." 169 F.3d at 992. The Court, in addressing its jurisdiction from an order denying Defendants' motion for summary judgment, observed that this form of immunity was "'effectively unreviewable' once the defendant is forced to go to trial, because he or she is permanently deprived of the right to avoid the burdens of litigation." 169 F.3d at 991-92.

In *Smith v. McDonald*, 737 F.2d 427 (4th Cir. 1984), the plaintiff David Smith brought a state court libel action against Robert McDonald, that was removed to federal court on diversity grounds. McDonald, a private individual that wrote letters to the President of the United States and members of Congress, that suggested Smith was not fit to be appointed as a U.S. Attorney. 737 F.2d 427, 427. McDonald moved for judgment on the pleadings, asserting that the letters were absolutely privileged under the petition clause of the First Amendment. In evaluating its jurisdiction, the Court found the claim of absolute immunity met the requirements for a collateral order appeal because:

> It is a final disposition of a claimed right which is independent from the subject matter of the libel action. It resolves an issue that cannot be effectively reviewed after final judgment. Deferral would defeat McDonald's claim that he should not be put to trial, which is the initial protection of absolute privilege. Finally, the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question because other courts have concluded that a petitioner is entitled to absolute privilege.

Smith v. McDonald, 737 F.2d 427, 428. In affirming the Fourth Circuit's determination that the Right to Petition affords only qualified immunity for such petitions, this Court, in *McDonald v. Smith*, 472 U.S. 479 (1985), noted that the interlocutory appeal under the collateral order doctrine was proper in that case, because the appeal raised a "'serious and unsettled' question concerning absolute immunity." 472 U.S. 479, 482, n. 3 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 742-743 (1982)).

In *Boice v. Unisys Corp.*, 50 F.3d 1145 (2d Cir. 1995), a New York Inspector General's investigation of bogus

entertainment expense vouchers, led to the production of documents by Unisys, which falsely identified the plaintiffs, state employees, as recipients of Unisys entertainment. The plaintiffs claimed that they were libeled by the production of the vouchers, without an accompanying explanation. Unisys removed the action to federal court under diversity jurisdiction, and on Defendants' motion to dismiss, the district court rejected the assertion that Defendants had absolute immunity to the defamation action. Defendants took an interlocutory appeal, and in assessing whether the appeal satisfied the collateral order doctrine, the court observed that:

> Because the immunity is designed to insulate an individual from litigation, an order denying total immunity is conclusive, and meets the first . . . prong. The second prong is met because the existence of absolute immunity, a privilege against suit, is entirely separate from the merits of the claim. . . . And, the third prong is satisfied because the "essence" of the immunity is a right not to go to trial, . . and it would be toothless if the holder could not obtain interlocutory review.

See also *Alternate Fuels, Inc. v. Cabanas*, 435 F.3d 855, 858 (8th Cir. 2006) ("An interlocutory appeal also lies from a denial of absolute privilege.") (denial of motion for summary judgment on claim of tortious interference with contract); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (collateral order appeal over denial of California anti-slapp motion); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1446 (4th Cir. 1996) (appeal from denial of motion for summary judgment asserting absolute immunity to defamation claims); *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. App. 2001) (collateral appeal of order denying claim of absolute immunity by private lawyer sued for defamation); *Messina v. Krakower*, 439 F.3d 755, 760 (D.C.Cir. 2006) (affirming

grant of summary judgment in favor of lawyer sued for defamation).

Although the foregoing cases predate *Will v. Hallock*, and are premised on appeals from defamation claims, they are inconsistent with the opinion of the Sixth Circuit, as each Court recognized that common law afforded a right not to stand trial to attorneys and parties for statements made in the course of judicial proceedings, and because none of the foregoing courts required a private party to demonstrate a distinct injury emanating from a high order public interest. Further, *Will v. Hallock* considered whether the denial of a motion to dismiss under the FTC Act's judgment bar gave the Court of Appeals jurisdiction under the collateral order doctrine. *Will v. Hallock*, __ U.S. __, 126 S.Ct. 952 (2006). As the Court's opinion in *Will* neither addressed the claim of absolute immunity raised by the Petitioners, nor purported to narrow the already narrow scope of the collateral order doctrine to exclude absolute immunity appeals by non-governmental parties, the Sixth Circuit misread *Will* as precluding the exercise of jurisdiction over this appeal.

B. Petitioners' claim of absolute immunity was well-recognized at common law, as a right not to stand trial, and may be applied to a federal statutory cause of action unless Congressional intent to abrogate appears manifest, or a statutory purpose to the contrary is evident. *U.S. v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Astoria Federal Savings & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991)). See also *Malley v. Briggs*, 475 U.S. 335, 339 (1986); *Wyatt v. Cole*, 504 U.S. 158, 170-175 (1992) (Kennedy, J., concurring); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997); 2A Sutherland, Statutory Construction §§ 50:1-50:5 (6th Ed. 2005); P. Hayden, *Reconsidering the Litigator's Privilege to Defame*, 54 Ohio St. L.J. 985, 1004-1010 (1993).

1. No clear statement of Congressional intent to abrogate common law immunity appears in the legislative text or its legislative history. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d. 432 (6th Cir. 2006).

The communications Congress sought to regulate by this legislation were directed to consumers and third parties, that occurred *outside* the context of litigation – late night telephone calls, threats of harm, harassing letters, disclosures of embarrassing debt information to employers, neighbors and family. S. Rep. No. 382, 95th Cong., 1st Sess. 1977, 1977 U.S.C.C.A.N. 1695, 1696; *Argentieri v. Fisher Landscapes, Inc.* 15 F.Supp.2d 55, 61(D.Mass. 1998).

The Act prohibited debt collectors from simulating legal process or representing that legal process was not legal process; from falsely claiming that documents were authorized, issued or approved by any court; falsely claiming to be an attorney; implying that non-payment would result in loss of a claim or defense, or threatening non-judicial action to deprive the consumer of property. 15 U.S.C. §§ 1692e(13), 1692e(15), 1692e(9), 1692e(3), 1692e(6)(A), 1692f(6). It further prohibited debt collectors from forum abuse, that is, filing a legal action in a distant forum, thereby depriving the consumer of his day in court. 15 U.S.C. § 1692i. S. Rep. 95-382, pp. 5-7, 1977 U.S.C.C.A.N. 1695, 1699. See also H.R. Rep. No. 131, 95th Cong., 1st Sess. 16 (1977). See generally H.R. Rep. 90-1040, 90th Cong., 2nd Sess. 1968, 1968 U.S.C.C.A.N. 1962 (TILA). The FDCPA contained several other references to Court processes, but none of these provisions expressly refer to pleadings filed in litigation. See 15 U.S.C. § 1692a(6)(D); § 1692c(a) & (b). Subsequent Congressional amendments evidence an intent to avoid the erroneous application of the FDCPA, after courts began interpreting provisions of the FDCPA as governing various aspects of court filings. 15 U.S.C. § 1692e(11) was amended to explicitly state that a "formal pleading filed in a legal action" are exempt from that paragraph's requirements; and

more recently, 15 U.S.C. § 1692g was amended by the Financial Services Regulatory Relief bill, S. 2856, adding §1692g(d), to exempt pleadings from the scope of that section. See Pub.L. 104-208, Title II, § 2305(a), Sept. 30, 1996, 110 Stat. 3009-425; Pub.L. 109-351, October 13, 2006, 120 Stat 1966. Thus, in 1977, when it was originally enacted, the intended scope of the legislation was clearly understood not to regulate the content of pleadings. S. Rep. 95-382, p. 7, 1977 U.S.C.C.A.N. 1695, 1701.

When Congress repealed the FDCPA's attorney exemption in 1986, the reason for the repeal had nothing to do with the content of pleadings – attorneys entered into direct competition with traditional debt collectors, advertising their exemption as a means of unfairly competing with collection agencies. The House Report accompanying the Amendment, referred to the country's largest collection law firm's volume practice, observing that "92% of the accounts handled that year did not involve legal action." H.R. Rep. No. 405, 99th Cong., 1st Sess. 1985, 1986 U.S.C.C.A.N. 1752 (11-26-85):

> Since passage of the Act, attorneys have increasingly entered the debt collection business and used the exemption to evade compliance with the Act. There are now about 5,000 attorneys engaged in the business of debt collection, compared to approximately 4,500 lay debt collection firms. H.R. 237 would remove the exemption from the Fair Debt Collection Practices Act and bring attorney collectors under the provisions of the Act.
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> Specific examples of attorney debt collection abuses were presented as exhibits attached to Mr. Johnson's testimony. These abuses, all prohibited by the Act, but inapplicable due to the attorney exemption, included late night telephone calls to consumers, calls to consumers' employers concerning the consumers'

> debts, frequent and repeated calls to consumers, disclosure of consumers' debt to third parties, threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken.

H.R. Rep. No. 405, 99th Cong., 1st Sess. 1985, 1986 U.S.C.C.A.N. 1752, 1754-1755 (11-26-85). If entry into the debt collection business by lawyers was a new phenomenon occurring for the first time after 1977, the 'debt collection business' as understood by Congress in 1985 did not include litigation, as attorneys have always been in the business of litigation. See P. Hayden, *Reconsidering the Litigator's Privilege to Defame*, 54 Ohio St. L.J. 985, 1004-1010 (1993). Congress intended to place attorneys engaged in debt collection under the same standards that governed lay debt collectors. *Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir.1997), cert. denied 523 U.S. 1022 (1998); *F.T.C. v. Shaffner*, 626 F.2d 32 (7th Cir. 1980). When introduced on the floor of the House, the same reasons were cited in support of the Amendment, and the Bill was characterized as "a fairness bill. It makes certain that all debt collectors operate under the same set of rules, a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors." 131 Cong.Rec. H10534-02 (Remarks of Rep. Annunzio) (12-2-85).

Indeed, before Congress amended the FDCPA in 1986 and removed the attorney exemption, Congress understood that the function performed by traditional debt collectors did not include litigation at all. In 1983, the Federal Debt Collection Act was enacted. See 31 U.S.C. § 3718. Pub.L. 97-452, § 1(16)(A), Jan. 12, 1983, 96 Stat. 2473. When it was originally enacted, debt collectors acting on behalf of the United States were not authorized to undertake any legal

action on behalf of the agency to collect those debts. S. Rep. 97-378, 97th Cong., 2nd Sess. 1982, 1982 U.S.C.C.A.N. 3377. In 1986, Congress determined that the threat of litigation was a valuable tool in the arsenal of a debt collector, which traditional debt collectors did not have, and found it both necessary and desirable to authorized federal agencies to contract with private law firms to not only collect debts, but to initiate litigation on behalf of the United States. Pub.L. 99-578, § 1, Oct. 28, 1986, 100 Stat. 3305; H.R. Rep. No. 909, 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 5605, 5606-07:

> In order to make the threat of litigation for non-payment of debts to the Government a real one, and thus to provide adequate incentives to pay these debts, the Attorney General would be authorized under H.R. 5541 to enter into contracts with private attorneys for the performance of legal services for the United States for the collection of these debts. . . .
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>
> In the situation where the agency chose to use a debt collection service, and the service was unable to collect the debt, the agency may then determine that private legal services are needed. In such a case, the agency itself must select the law firm to handle the debt, although the debt collection service may, pursuant to contract or agency direction, actually transfer the file to the law firm selected by the agency. In the case of such a decision, the debt collection service must return the entire file on the debt to the agency or transfer it at the agency's direction to the selected law firm

Congress, moreover, knows how to regulate the procedures employed in litigation, but has delegated substantially all its authority in this regard to the Court. See 28 U.S.C. §§ 3001-3308, 3003(f) (making the Federal Rules of Civil Procedure applicable to claims under the Federal Debt Collection Act).

See also 28 U.S.C. § 2072 (Rules Enabling Act); 4 Wright & Miller, Federal Practice & Procedure Civ. 3d § 1001 (2002).

2. Whether a federal court should apply a state common law absolute privilege and absolute immunity in a federal question case involving supplemental state law claims, is either determined under a functional analysis, under the federal common law, an *Erie* analysis, or Federal Evidence Rule 501. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d. 432 (6th Cir. 2006); 19 Wright & Miller, Fed. Prac. & Proc. Juris.2d §§ 4501-4520; *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074-75 (7th Cir.1998). "[A] great deal of confusion surrounds the application of state-law privileges in cases arising under a District Court's federal question jurisdiction." *Waterloov Gutter Protection Systems Co., Inc. v. Absolute Gutter Protection, L.L.C.*, 64 F.Supp.2d 398, 412-414 (D.N.J. 1999). Taken together, the various ways which federal courts give recognition to state common law immunity and absolute privilege, involve an evaluation of the forum states privilege law and how it dealt with analogous tort claims, history, reason, safeguards to prevent abuse, and consistency of purpose between federal interests and interests promoted by the privilege. 19 Wright & Miller, Fed. Prac. & Proc. Juris.2d §§ 4501-4520; 28 U.S.C. § 1652. See also Fed. R. Evid. 501; *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074-75 (7th Cir.1998). Evaluating each of these considerations, support recognition of absolute immunity in this case.

Respondent's claims under the FDCPA contain one or more elements of the common law equivalent of a defamation action,[1] an action for invasion of privacy,[2] for emotional

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[1] Defamation is defined as a false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace, or affects him adversely in his trade or business. *Garrison v. State of La.*, 379 U.S. 64, 73 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); Restatement (Second) of Torts § 558 (1977).

distress,[3] deceit,[4] or payment made under duress, extortion or coercion.[5] See Annotation, Right of action for damages because of methods used in attempting to collect debts, 106 A.L.R. 1453 (1937), 55 A.L.R. 971 (1928).[6] Although the absolute privilege was originally applicable only to defamation claims, it is now commonly recognized as a bar to any tort claim premised on statements made in the course of judicial proceedings. See e.g., *Willis & Linnen Co., L.P.A. v. Linnen*, 163 Ohio App.3d 400, 404, 837 N.E.2d 1263, 1266 (2005) (malicious prosecution); *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 34 (Utah 2003) (deceit claim); *Bio/Basics Intern. Corp. v. Ortho Pharmaceutical Corp.*, 545 F.Supp. 1106, 1116 (S.D.N.Y. 1982) (tortious interference with contract, breach of fiduciary relationship); *Yang v. Lee*, 163 F.Supp.2d 554, 564 (D.Md. 2001); (emotional distress); P. Hayden, *Reconsidering the Litigator's Privilege to Defame*, 54 Ohio St. L.J. 985, 988

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[2] Restatement (Second) of Torts §652A (1977). See e.g., *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956); *Rugg v McCarty*, 173 Colo. 170, 476 P2d 753 (Colo. 1970); *Montgomery Ward v. Larragoite*, 81 N.M. 383, 385, 467 P.2d 399, 401(N.M. 1970). Such claims were not displaced when the FDCPA was enacted. *Bauer v. Ford Motor Credit Co.*, 140 F.Supp.2d 1019, vacated in part on reconsideration, 149 F.Supp.2d 1106, 1110 (D.Minn. 2001).

[3] Restatement (Second) of Torts §46 (1977).

[4] Restatement (Second) of Torts § 525 (1977). See *Beeck v. Kapalis*, 302 N.W.2d 90, 97 (Iowa 1981); *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 34 (Utah 2003); *Janklow v. Keller*, 90 S.D. 322, 241 N.W.2d 364, 367, 370 (1976); *Smith v. Lewis*, 3 Johns. 157, 3 Am.Dec. 469 (N.Y.Sup. 1808); *Cunningham v. Brown*, 18 Vt. 123, 46 Am.Dec. 140 (Vt. 1846).

[5] See 25 Am.Jur.2d Duress and Undue Influence §§2, 5-18, 26.

[6] See also Annotation, Threatening, instituting or prosecuting legal action as invasion of right of privacy, 42 ALR3d 865 (1972); Annotation, Placarding debtor as libel, 3 A.L.R. 1596 (1919); Annotation, Recovery by debtor, under tort of intentional or reckless infliction of emotional distress, for damages resulting from debt collection methods, 87 A.L.R.3d 201 (1978); Annotation, Public disclosure of person's indebtedness as invasion of privacy, 33 A.L.R. 3d 154 (1970).

(1993); Restatement (Second) of Torts §§ 586, 587, 588, 652F (1977).[7]

Respondent's claims under 15 U.S.C. §§ 1692e(2), 1692e(10), and 1692f(1) turn on allegations of false representations concerning the debt *contained in or attached to* a pleading, and therefore could not be characterized as malicious prosecution, abuse of process, or wrongful use of civil proceedings, all of which turn on the propriety of *initiating* an action. Even if they could be so characterized, liability could only be imposed under the common law where probable cause to commence the proceedings did not exist and evidence of malice was shown. Restatement (Second) of Torts §§ 674, 675, 682 (1977).

The Circuit Courts have held 15 U.S.C. § 1692e and §1692f are strict liability statutes, governed by an objective test, based on the understanding of the "least sophisticated consumer" or the "unsophisticated consumer." *Clark v. Capital Credit & Collection, Inc.*, 460 F.3d 1162 (9th Cir. 2006); *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324 (6th Cir. 2006); *Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991, 995 (7th Cir. 2003); *Duffy v. Landberg*, 215 F.3d 871, 874 (8th Cir. 2000); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir.1997); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir.1996); *United States v. National Financial Servs., Inc.*, 98 F.3d 131,

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[7] See also *Arneja v. Gildar*, 541 A.2d 621, 623 (D.C. App. 1988) (defamation); *Hawkins v. Harris*, 141 N.J. 207, 661 A.2d 284, 288 (1995) (defamation); *Surace v. Wuliger*, 25 Ohio St.3d 229, 233-34, 495 N.E.2d 939 (1986) (defamation); *Waters v. Dinn*, 666 N.E.2d 433, 437 (Ind.App. 1996) (invasion of privacy & emotional distress); *McGrew v. Heinold Commodities, Inc.*, 147 Ill.App.3d 104,114, 497 N.E.2d 424, 432, 100 Ill.Dec.446, 454 (Ill.App. 1 Dist. 1986) (privacy); *Moore v. Brewster*, 96 F.3d 1240, 1246 (9th Cir. 1996) cert. denied 519 U.S. 1118 (1997) (emotional distress); *Sawyer v. Michigan State Police*, 310 F.Supp.2d 876, 878 (E.D. Mich. 2004) (same); *Perry v. Gold & Laine, P.C.*, 371 F.Supp.2d 622, 627-28 (D.N.J. 2005) (same).

136 (4th Cir.1996); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

Yet, the imposition of strict liability for the content of pleadings under the FDCPA runs counter to the Court's Right to Petition, Free Speech and *Noerr-Pennington* cases, holding liability cannot attach to petitioning unless the pleading is objectively baseless and subjectively motivated by an improper purpose. *McDonald v. Smith*, 472 U.S. 479, 484 (1985). Filing a complaint in court is a form of petitioning activity protected under the First Amendment's Right to Petition. *McDonald v. Smith*, at 484 & 486-487, 490. While *McDonald* stated that no absolute privilege existed under the Petition Clause, it nonetheless required application of the actual malice standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), before liability can attach. *McDonald*, 472 U.S. at 485. Further, the *Noerr-Pennington* doctrine affords qualified immunity for commencing the action, leaving unanswered whether the content of petitions is actionable under the same qualified immunity standard, or the absolute immunity afforded under the judicial proceeding privilege applies. See *J & J Const. Co. v. Bricklayers and Allied Craftsmen, Local 1*, 468 Mich. 722, 735-55, 755-62, 664 N.W.2d 728 (2003) (Young, J., concurring).

The plain meaning of the FDCPA must yield when an Act of Congress implicates interests protected by the First Amendment. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-41 (1983). See also *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). Here, the context in which Plaintiffs' claims arise – the content of a complaint filed in a state court seeking an adjudication of the amount owed on a debt, "stands apart" from other forms of conduct, and "runs headlong" into core values protected by the First Amendment, warranting a

departure from a literal application of the Act. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002).

Under the *Noerr-Pennington* doctrine, qualified immunity from suit is provided to petitioning parties who are sued for violating a federal law, unless there is a showing in the federal suit that the prior suit was both objectively baseless and subjectively motivated by an unlawful purpose. *United Mine Workers of Am. v. Pennington,* 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002).

Applying the strict liability standards of the FDCPA to any misstatement contained in a petition invoking a court's jurisdiction, would violate or unduly chill this First Amendment right. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002); *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 930-31 (9th Cir. 2006).

As such, failing to recognize the absolute privilege could lead to the conclusion that the FDCPA is unconstitutionally vague or overbroad under the First Amendment. Cf. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 111 (1990).

C. The statutory purpose of the FDCPA is consistent with the purposes underlying Petitioners' claim of common law immunity. "The FDCPA is a consumer protection statute, the goal of which is 'to protect consumers from unfair, deceptive and harassing collection practices while leaving collectors free to employ efficient, reasonable and ethical practices in pursuit of their profession.'" *Ray v. Citibank (South Dakota), N.A.*, 187 F.Supp.2d 719, 722 (W.D.Ky. 2001) (quoting *Graziano v. Harrison,* 763 F.Supp. 1269, 1275 (D.N.J.1991), rev'd. on other grounds 950 F.2d 107 (3d Cir. 1991)). Filing

suit to collect on a legitimate debt and hiring a law firm to collect on a legitimate debt is not prohibited by the FDCPA. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 411 (6th Cir. 1998). Construed generally, one could ascribe the FDCPA with the purpose of ensuring that truthful information is provided to consumers concerning their debts.

The purpose behind common law immunity for statements made in the course of judicial proceedings, is to foster the free and fair exchange of information, allow zealous advocacy, undivided loyalty, and promotion of the truth-seeking aims of the adjudicatory process. Justice White, in his concurring opinion in *Imbler v. Pachtman*, 424 U.S. 409, 439-440, observed:

> "Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences."

(quoting 1 F. Harper & F. James, The Law of Torts, § 5.22, p. 424 (1956) & Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Col.L.Rev. 463, 469 (1909)). See also *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997), cert. denied 523 U.S. 1022 (1998); *Argentieri v. Fisher Landscapes, Inc.*, 15 F.Supp.2d 55, 62 (D.Mass. 1998):

> The courts have their own system of protections against abusive tactics that occur during litigation. A grossly exaggerated debt or unfounded claim in a pleading could represent an abuse of process, and subject the attorney or client to sanctions or other disciplinary mechanisms. . . . Given these protections,

> when a claim is made to the court, there is no need to invoke the protections of a statute designed to protect consumers from unscrupulous, unsupervised debt collection tactics such as threats of violence and harassing telephone calls. (footnote omitted).

The immunity sought here is not inconsistent with the purposes of the FDCPA, because both the common law immunity and the FDCPA are intended to promote truth – truth-seeking, and truthful information, respectively. As such, no contrary purpose would justify denying the claimed immunity sought here. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d. at 446-47, (absolute immunity was reserved "for individuals when they functionally serve as 'integral parts of the judicial process,' such as judges, advocates, and witnesses in their ordinary judicial roles.") (quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)); *Etapa v. Asset Acceptance Corp.*, 373 F.Supp.2d 687 (E.D. Ky. 2004); *Beck v. Codilis & Stawiarski, P.A.*, 2000 Westlaw 34490402, *6 (N.D.Fla. 2000).

D. Respondent's pendent claims under the Ohio CSPA are also subject to federal common law interpreting a state law litigation privilege. 23 Wright & Miller, Federal Practice & Procedure § 5433 (1980); compare with *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979). Ohio law recognizes immunity for participants in the judicial process. *Surace v. Wuliger*, 25 Ohio St.3d 229, 235, 495 N.E.2d 939, 944 (1986). See also e.g., *Battig v. Forshey*, 7 Ohio App.3d 72, 454 N.E.2d 168 (4th Dist. App. 1982); *Pease Co. v. Huntington Nat. Bank*, 24 Ohio App.3d 227, 495 N.E.2d 45 (10th Dist. App. 1985); *Simmons v Climaco*, 30 Ohio App.3d 225, 507 N.E.2d 465 (8th Dist. App. 1986); *Elsass v. Tabler*, 131 Ohio App.3d 66, 721 N.E.2d 503 (10th Dist. App. 1999).

With respect to Ohio law, Petitioners possess a privilege for statements made in the course of judicial

proceedings, as the privilege protects the integrity and reputation of the justice system by allowing persons involved in judicial proceedings to speak freely without fear of retaliatory suits against them. *Erie Cty. Farmers' Ins. Co. v. Crecelius*, 122 Ohio St. 210, 171 N.E. 97 (1930). Thus, witnesses, parties, attorneys, and judges are protected while functioning as such in the usual and regular course of judicial proceedings. See id.; *Surace v. Wuliger*, 25 Ohio St.3d 229, 495 N.E.2d 939, syllabus (1986); *Justice v. Mowery*, 69 Ohio App.2d 75, 76, 430 N.E.2d 960, 961-962 (1980). The privilege applies from the outset of judicial proceedings through its conclusion. *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505, 634 N.E.2d 203, 209 (1994); *Monaghan v. Wang*, 86 A.D.2d 548, 549, 446 N.Y.S.2d 269 (1982).

Ohio law also recognizes the principle that state statutes must be construed as consistent with and not in derogation of common law unless a clear intent of the legislature appears to the contrary. *Danziger v. Luse*, 103 Ohio St.3d 337, 815 N.E.2d 658 (2004); *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 212, 503 N.E.2d 159, 161(1986). Further, the Ohio CSPA does not supersede common law claims and defenses. *Mid-America Acceptance Co. v. Lightle*, 63 Ohio App.3d 590, 601, 579 N.E.2d 721, 728 (Ohio App. 10 Dist. 1989); R.C. § 1345.13; *Davila v. Calo*, 1985 Westlaw 4615, *2 (Ohio App. 8 Dist. 1985). Under Ohio law, "[a] creditor has a right to take reasonable action to pursue his debtor and persuade payment." *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), paragraph 3 of the syllabus; *Havens-Tobias v. Eagle*, 2003 Westlaw 1601461, *6 (Ohio App. 2d Dist. 2003).

The Ohio Consumer Sales Practices Act, modeled after the Uniform Consumer Sales Practices Act, was adopted in Ohio in 1972.[8] The definition of a "supplier" contained in the Uniform Act, differs in a substantial respect from the

[8] Ohio Session Law, 1972 H 103.

Ohio version enacted; the ULA defined a 'supplier' as "a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer[;]" while the Ohio version provides that a supplier is "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer."[9] The variation in statutory text obviously evidences a legislative intent to limit the scope of the Act to exclude enforcement or collection activity.[10]

As such, the state law immunity for attorneys and parties applies to claims made under the Ohio CSPA, as interpreted by federal common law. 23 Wright & Miller, Federal Practice & Procedure § 5433 (1980). Because the state interests in keeping courts open, regulating the practice of law and governing the procedures used by state courts could be undermined by applying state consumer protection law to litigation, Respondent's Ohio CSPA claim for statements made by counsel and its client in the course of the underlying suit are barred. *Harris v. Reams*, 2 Ohio Dec.Reprint 281, 1860 Westlaw 3926, p. 4 (Common Pleas 1860); see also e.g. *Jackson v. R.G. Whipple, Inc.*, 225 Conn. 705, 627 A.2d 374, 385 (1993); *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 496, 656 A.2d 1009 (1995); *Suffield Dev. Assocs. Ltd. P'ship v. Nat'l Loan Investors, L.P.*, 260 Conn. 766, 781-82, 802 A.2d 44 (2002); *Jeckle v. Crotty*, 120 Wash.App. 374, 384, 85 P.3d 931, 937 (Wash.App. Div. 3, 2004); *Rubin v. Green*, 4 Cal.4th 1187, 1203, 847 P.2d 1044, 1054, 17 Cal.Rptr.2d 828, 838 (Cal. 1993).

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[9] U.L.A, Unif. Consumer Sales Practices Act § 2 (emphasis added); R.C. §1345.01(C).

[10] See *State ex rel. Miller v. Midwest Service Bureau of Topeka, Inc.*, 229 Kan. 322, 323, 623 P.2d 1343, 1345 (1981). See also S. Rep. 95-382, 1977 U.S.C.C.A.N. 1695, 1696-97 (observing Ohio had no debt collection statute five years after the Ohio CSPA was enacted).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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DELAWDER V. PLATINUM FINANCIAL SERVICES CORP., 2006 WESTLAW 1749617, 2006 FED.APP. 0413N

(6th Cir. 2006)

United States Court of Appeals,Sixth Circuit.
Herbert DELAWDER, Plaintiff-Appellee,
v.
PLATINUM FINANCIAL SERVICES CORP., et al.,
Defendants-Appellants.
No. 05-3318.

June 19, 2006.

Argued: January 31, 2006.
Decided and Filed: June 19, 2006.
Rehearing En Banc Denied October 2, 2006.

Before COLE, GIBBONS, and ROGERS, Circuit Judges.

COUNSEL
ARGUED: Michael D. Slodov, Javitch, Block & Rathbone, Cleveland, Ohio, for Appellants. Stephen R. Felson, Cincinnati, Ohio, for Appellees. ON BRIEF: Michael D. Slodov, Javitch, Block & Rathbone, Cleveland, Ohio, for Appellants. Stephen R. Felson, Cincinnati, Ohio, Steven C. Shane, Bellevue, Kentucky, for Appellees.

OPINION
R. GUY COLE, Jr., Circuit Judge.
*1 Defendants, a debt collection agency and its attorneys, seek collateral review of a district court order rejecting their claim of absolute immunity from suit for statements they made as "participants in the judicial process." For the following reasons, we dismiss this appeal for lack of jurisdiction, and we decline to grant mandamus relief.

I.

Defendant-Appellant Platinum Financial Services, Inc. ("Platinum Financial") is a company that specializes in the purchase and collection of distressed consumer debt. Through its counsel, Javitch, Block & Rathbone LLP ("JB & R"), also a defendant in this matter, Platinum Financial brought a debt collection action against Plaintiff-Appellee Herbert Delawder in 2003 in municipal court in Lawrence County, Ohio. Nena Pavlovic, also a defendant, is an attorney at JB & R who participated in the representation of Platinum Financial in its suit against Delawder. Attached to the complaint served upon Delawder was a notarized affidavit representing that Delawder owed $5,355.60. Delawder filed a timely answer and sought discovery from Platinum Financial. Having received no response to a deposition notice, Delawder threatened to move for sanctions if Platinum Financial did not comply with discovery obligations. Platinum Financial voluntarily dismissed its suit against Delawder before any discovery was conducted.

Delawder brought suit against the defendants, alleging that the affidavit accompanying the defendants' complaint had falsely stated that he owed $5,355.60, in violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § § 1692-1692o, and the Ohio Consumer Sales Practices Act (CSPA), Ohio Rev.Code § 1345.01-.99. The defendants sought dismissal of all of Delawder's claims, arguing, among other things, that attorneys and their clients are shielded by absolute immunity under both federal and state law for statements made in the course of judicial proceedings. The court granted in part the defendants' motion to dismiss, finding that Delawder had failed to state a claim under several provisions of the FDCPA and CPSA, but rejected the defendants' absolute immunity arguments and denied the defendants' motion to dismiss as to Delawder's claims under

15 U.S.C. § § 1692e(2), 1692e(10), and 1692f(1), and Ohio Rev.Code § 1345.02(B)(10).

The defendants appeal the district court's partial denial of their motion. They reassert their argument for absolute immunity, and assert that this Court has jurisdiction to consider their immunity argument under the collateral order doctrine. They also reassert various First Amendment, Tenth Amendment, and statutory interpretation defenses that they claim are "inextricably intertwined with their claims of immunity." In the alternative, the defendants seek a writ of mandamus ordering the same remedy sought in their appeal.

II.

This court has appellate jurisdiction over "final decisions" of the district courts, except those that are appealable directly to the Supreme Court. 28 U.S.C. § 1291. "Final decisions" include a "small class" of orders that, while not finally resolving the entire litigation, "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). This rule, frequently referred to as the "collateral order doctrine," has been applied to permit interlocutory appeals from denials of "substantial claim[s]" of absolute immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), in circumstances where the party claiming immunity seeks "avoidance of a trial that would imperil a substantial public interest," *Will v. Hallock*, --- U.S. ----, ----, 126 S.Ct. 952, 959, 163 L.Ed.2d 836 (2006).

*2 The defendants argue that all necessary participants in a judicial proceeding enjoy absolute immunity from suit for statements made in and pertaining to the proceeding, and that this immunity extends to private attorneys and civil plaintiffs such as themselves. The defendants rely upon Supreme Court cases that have recognized immunity from suit in certain circumstances for judges, see *Stump v. Sparkman*, 435 U.S. 349, 355-56, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1871), for prosecutors, see *Burns v. Reed*, 500 U.S. 478, 484-85, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), and for third party witnesses, see *Briscoe v. LaHue*, 460 U.S. 325, 330-34, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), as well as cases that acknowledge an English common law protection for private attorneys from damages liability, *Burns*, 500 U.S. at 490 (quoting *King v. Skinner*, (1772) 98 Eng. Rep. 529, 530 (K.B.)); *Briscoe*, 460 U.S. at 330-31, 335. Consistent with their position in district court, see JA 58-59, the defendants at oral argument explicitly disclaimed reliance upon the doctrine of witness immunity, and instead characterized their defense as an argument for "advocacy immunity." They argue that this theory of immunity provides jurisdiction for an interlocutory appeal under the collateral order doctrine.

[1] In *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944, 949-51 (6th Cir.2006), we rejected the defendants' arguments for the existence of an absolute advocacy immunity that would provide the basis for an interlocutory appeal. As *Kelly* makes clear, we have no jurisdiction to consider the defendants' interlocutory appeal in this case. Because we lack jurisdiction to consider the defendants' immunity claim, we also lack pendent appellate jurisdiction over the defendants' other "inextricably intertwined" defenses. See id. at 951.

III.

[2] By letter filed with this Court on April 26, 2006, pursuant to Federal Rule of Appellate Procedure 28(j), the defendants also request, in the event that we find jurisdiction lacking under the collateral order doctrine, that we construe the defendants' notice of appeal as an application for a writ of mandamus. Mandamus relief is appropriate only in "extraordinary situations." *Kelly*, 447 F.3d at 951 (quoting *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)). When considering whether to grant mandamus relief, we look to whether: (1) the party has no other adequate means to attain the relief desired, (2) the party will be damaged or prejudiced in a way not correctable on appeal, (3) the district court's order is clearly erroneous, (4) the district court's order demonstrates an oft-repeated error or persistent disregard for federal law or procedure, or (5) the district court's order raises new and important problems or issues of first impression. Id. (citing *United States v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 473 (6th Cir.2006)). Consideration of each of these factors leads us to conclude that mandamus relief is not warranted.

IV.

*3 For the preceding reasons, this appeal is dismissed for lack of jurisdiction.

DELAWDER V. PLATINUM FINANCIAL SERVICES CORP., 443 F. SUPP.2D 942 (S.D. OHIO 2005)

United States District Court,S.D. Ohio,Western Division.
Herbert DELAWDER, Plaintiff,
v.
PLATINUM FINANCIAL SERVICES CORP. et al.,
Defendants.
No. C-1-04-680.

March 1, 2005.

Stephen R. Felson, Cincinnati, OH, Steven Charles Shane, Bellevue, KY, for Plaintiff.

Michael D. Slodov, Javitch Block & Rathbone LLP, Cleveland, OH, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

DLOTT, District Judge.

This matter comes before the Court on Defendants' Motion to Dismiss for Failure To State a Claim and Motion to Dismiss for Lack of Subject Matter Jurisdiction (doc. # 10).FN1 Defendants in this case are Platinum Financial Services Corp. ("Platinum Financial "), law firm Javitch, Block and Rathbone ("JB & R"), and Nena Pavlovic ("Pavlovic"), an attorney at JB & R (collectively, "Defendants"). For the reasons set forth below, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss.

FN1. Defendants have also filed a Notice of Supplemental Authority (doc. # 15) in support of their Motion to Dismiss. The Court has reviewed the cases cited in Defendants' Notice and considered them in coming to this decision.

I. BACKGROUND

Plaintiff Herbert Delawder alleges that on October 1, 2003, Pavlovic filed a complaint in the Ironton Municipal Court on behalf of JB & R's client, Platinum Financial, asserting that Platinum Financial was the owner of a debt owed by Delawder and seeking collection of that debt. (Doc. # 1, ¶ ¶ 8,9.) The Ironton complaint alleged that Delawder owed a debt of $5355.60 plus interest and costs. (Id., ¶ 10.) Defendants attached to the complaint an affidavit signed by Dan Varner, Vice President of Platinum Financial, attesting that the account holders, Herbert and Emma Delawder, owed to Platinum Financial the amount of $5355.60, plus interest and costs, on their account number 6011005215005326. (Id., ex. A.) In response, Delawder filed an answer denying the allegations of the Ironton complaint and sought discovery from Defendants concerning the alleged debt. (Id. ¶ 11-12.) On December 2, 2003, before any discovery*945 occurred, Defendants voluntarily dismissed the Ironton case without prejudice. (Id. ¶ 13.)

Delawder filed this complaint on September 30, 2004, alleging that Defendants violated several provisions of both the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq., and the Ohio Consumer Sales Practices Act ("OCSPA"), Ohio Rev.Code § 1345.01, et seq. In sum, Delawder alleges that Defendants violated the FDCPA and the OCSPA by filing the Ironton complaint, and attaching a false affidavit to the complaint, all the while knowing that they did not have means of proving the debt.FN2 Defendants now move to dismiss all of Delawder's claims.

FN2. Delawder has also brought a claim under Ohio Revised Code section 1345.09(D), which permits a consumer the right to seek "a declaratory judgment,

an injunction, or other appropriate relief against an act or practice that violates [section 1345]." Defendants apparently seek to dismiss this claim as well, arguing that Delawder may obtain such relief only after making the appropriate showing under Federal Rule of Civil Procedure 65. Defendants are correct. See *Mick v. Level Propane Gases, Inc.*, 168 F.Supp.2d 804, 811 (S.D.Ohio 2001). The Court notes, however, that although Delawder framed this request as a claim, it is actually merely a request for a remedy based upon his other claims. Delawder has not yet moved for such relief. The Court agrees with Delawder that it is premature to consider appropriate remedies at this point in the proceedings and declines to consider Defendants' motion to dismiss as to this request for remedy.

II. JURISDICTION AND LEGAL STANDARD

The FDCPA specifically provides for federal jurisdiction over claims made pursuant to the Act. See 15 U.S.C. § 1692k(d). The Court has federal question jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction over Delawder's state law claims under 28 U.S.C. § 1367. In considering Delawder's state law claims pursuant to its supplemental jurisdiction, this Court must follow Ohio law. See *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 741 (6th Cir.1999).

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In assessing the sufficiency of a complaint, courts must follow "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2

L.Ed.2d 80 (1957). This accords with the purpose of Rule 12(b)(6), which the Sixth Circuit has explained "is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir.1993).

Generally, a court may not consider matters outside the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. The Sixth Circuit has held, however, that " '[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [plaintiff's] claim.' " See *Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 89 (6th Cir.1997) (citations omitted). Defendants attached three documents to their Motion to Dismiss: Delawder's Answer to the Ironton complaint, a letter from Delawder's counsel in the Ironton suit to Robert Lurie at JB & R regarding his noticed deposition, and Plaintiff's Notice of Voluntary Dismissal in the Ironton case. The two court filings are admissible as public records. See *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir.2003) (courts may consider materials beyond the *946 complaint "if such materials are public records or are otherwise appropriate for the taking of judicial notice"). Also, Delawder referenced, or at least referred to, all of these documents in his complaint, and actually attached one of them to the complaint. (See doc. # 1, ¶ ¶ 11-13, and ex. B.) As these documents are central to Delawder's claim, the Court will consider all three of them in ruling on Defendants' Motion to Dismiss.FN3

FN3. Defendants also attached a document to their Reply which appears to be an assignment of Delawder's credit debt to Platinum Financial. (See doc. # 14, ex. 1.) The Court is uncertain whether the

> rule regarding consideration of attachments to a motion to dismiss applies equally to documents attached to a reply in support of a motion to dismiss. Regardless, the Court declines to consider this attachment in ruling on Defendants' motion. Delawder did not refer to the attached document in his complaint and likely did not even know of its existence. Moreover, the document is neither a public document nor self-authenticating, and refers to another portion of the agreement which was not also attached. Finally, though the document may be pertinent to this case, it would be unfair for the Court to consider it when Delawder has not had a chance to review or respond to it.

Finally, "[o]n a Fed.R.Civ.P. 12(b)(6) motion, all of the allegations contained in the plaintiff's complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion." *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir.1995). At the same time, however, the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987).

IV. ANALYSIS

A. FDCPA Claims

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692e; accord *Montgomery v. Huntington Bank*, 346 F.3d 693, 698 (6th Cir.2003).

1. Defendants as Debt Collectors

Preliminarily, for the Defendants to be liable under the FDCPA, they must fall within the FDCPA's definition of a "debt collector." The FDCPA defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." See 15 U.S.C. § 1692a(6).

[1] Delawder has alleged that JB & R and Pavlovic are "engaged in the practice of collecting debts on behalf of the [sic] third parties" and therefore are "debt collectors" under Section 1692a(6). (See doc. # 1, ¶ 5.) The Supreme Court has held that lawyers and their law firms who regularly engage in consumer debt-collection litigation qualify as "debt collectors" under the FDCPA, and thus may be held liable under its provisions. See *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

[2] Delawder's allegations do not exactly mirror the statutory definition, and Delawder has not yet alleged any facts suggesting that either JB & R or Pavlovic regularly engage in debt collection. It may be that discovery shows that JB & R and Pavlovic do not regularly engage in debt collection, and thus are not debt collectors liable under the FDCPA, though the Court notes that they have not challenged their *947 categorization as debt collectors. When construed in the light most favorable to Delawder, the Court finds that Delawder's allegation that JB & R and Pavlovic are debt collectors is sufficient to survive a motion to dismiss.

Similarly, Delawder has alleged that Platinum Financial "specializes in the purchase of and the collection of distressed consumer debt consisting of old defaulted and delinquent obligations or accounts which it purchases from original creditors" and that it is therefore a debt collector under Section 1692a(6). (See doc. # 1, ¶ 4.) Delawder has alleged facts suggesting that Platinum Financial is in the business of regularly collecting debts, and Platinum Financial has not challenged those allegations. Consequently, when taken in the light most favorable to Delawder, the Court finds that Delawder's allegation that Platinum Financial is a debt collector is sufficient to survive a motion to dismiss.

2. Alleged Conduct

a. Liability for Litigation Conduct Generally

Defendants suggest that their conduct is exempt from the strictures of the FDCPA because it occurred in the context of litigation, and to forbid such practices is an overbroad reading of the statute and of the Supreme Court's decision in Heintz. Defendants argue specifically that *Heintz* was only about a lawyer's sending of a letter, and should not be read to extend FDCPA liability to the filing of a pleading. (See doc. # 10, at 9.) Defendants misread *Heintz*, which was not limited to the context of the case.

[3] In *Heintz*, the defendant-attorney argued that the Court should read the FDCPA as "containing an implied exemption for those debt-collecting activities of lawyers that consist of litigating." 514 U.S. at 295, 115 S.Ct. 1489. The Court noted that an earlier version of the FDCPA included an express exemption for lawyers, but that exemption was repealed. *Id.* at 294-95, 115 S.Ct. 1489. The Court took this as evidence of Congress' intent to subject lawyers to the

FDCPA whenever they met the definition of "debt collector." Thus, the Court held that the FDCPA "applies to attorneys who regularly engage in consumer-debt-collection activity, even when that activity consists of litigation." See *id.* at 294, 299, 115 S.Ct. 1489.

Consequently, Defendants can be held liable for all litigation conduct, including the filing of the Ironton complaint, if that conduct violates the FDCPA.

b. Specific Statutory Claims

[4] Defendants wrongly construe Delawder's claims as based only upon "the mere filing of a lawsuit, and voluntary dismissal." (See doc. # 14, p. 2.) First, Delawder claims that Defendants violated Section 1692e(2) by falsely representing the character, amount, or legal status of a debt. Delawder claims that Defendants misrepresented both the amount of the debt and Platinum Financial's legal interest in it. (See doc. # 1, ¶¶ 14-16). Courts have recognized claims under Section 1692(e) that are, as here, based upon a debt collector's filing of a complaint to collect a debt and attaching an affidavit to the complaint that allegedly misrepresented the amount of the debt or the debt collector's legal claim upon the debt. See, e.g., *Hartman v. Asset Acceptance Corp.*, No. 1:03-cv-113, slip op. at 19 (S.D.Ohio Sept. 29, 2004); see also *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir.2000); compare *Beck v. Codilis & Stawiarski, P.A.*, No. 4:99cv485-RH, 2000 WL 34490402, *8, 2000 U.S. Dist. LEXIS 22440, at *17-18 (N.D.Fl. Dec. 27, 2000) (debt collector-attorneys violated Section 1692e(2) by filing false affidavits in collection suit, but plaintiff-debtor could not recover*948 because action was barred by absolute witness immunity). The Court thus holds that Delawder's allegation that Defendants falsely represented the nature of his debt states a claim under Section 1692e(2).

[5] Second, Delawder claims that Defendants violated Section 1692f(1), by attempting to collect an amount of debt when that amount was not expressly authorized by the agreement creating the debt or permitted by law. (See doc. # 1, ¶ 14.) Courts have recognized claims under Section 1692f(1) where, as here, a debt collector files a lawsuit seeking an amount allegedly greater than the amount owed under a debt agreement. See, e.g., *Conner v. Howe*, 344 F.Supp.2d 1164, 1172-73 (S.D.Ind.2004) (granting plaintiff summary judgment for Section 1692f(1) claim against debt collector-attorney for filing lawsuit seeking to collect amount greater than permitted by loan agreement, that additionally was invalid); see also *Miller v. Wolpoff & Abramson,* 321 F.3d 292, 308 (2nd Cir.2003) (recognizing plaintiffs would state a claim against defendant law firm if law firm sued to collect an amount not permitted by debt agreement or by law, but affirming dismissal of plaintiff's claim on other grounds). The Court thus holds that Delawder states a claim under Section 1692f(1).

Third, Delawder claims that Defendants threatened to take an action that cannot legally be taken or that is not intended to be taken in violation of 15 U.S.C. § 1692e(5). Like his other claims, Delawder's claim under Section 1692e(5) is based generally upon Defendants' filing of the Ironton complaint, an action that Delawder argues could not legally be taken for a variety of reasons. However, regardless of the legality of Defendants' filing of the Ironton complaint, Defendants did not threaten to take that action, but actually took it by filing the complaint. Moreover, contrary to Delawder's argument, the fact that Defendants later voluntarily dismissed the Ironton complaint does not change the fact that Defendants in fact took the threatened action by filing suit.

[6] Courts have rejected claims under Section 1692e(5) based upon allegedly illegal conduct that is not just threatened, but actually undertaken. See *Wehrheim v. Secrest*, No. IP 00-1328-C-T/K, 2002 WL 31242783, at *5 (S.D.Ind. Aug.16, 2002) (granting summary judgment to defendant debt collector on Section 1692e(5) claim where debt collector actually filed allegedly illegal suit to recover on debt), see also *Clark v. Pollard*, No. IP 99-1414-C H/G, 2000 WL 1902183, at *2-3 (S.D.Ind. Dec.28, 2000) (plaintiff did not state a claim under Section 1692e(5) for allegedly illegal action actually undertaken), *Pearce v. Rapid Check Collection, Inc.*, 738 F.Supp. 334, 338 (D.S.D.1990) (same). The Court finds the former opinions persuasive and holds that Delawder does not state a claim under Section 1692e(5).

[7] Fourth, Delawder claims that Defendants violated Section 1692e(10) by using a false representation or deceptive means to collect or attempt to collect a debt. Specifically, Delawder alleges the Defendants attached an affidavit to the Ironton complaint which contained "false and frivolous assertions." (See doc. # 1, ¶ 16.) Courts have recognized claims under Section 1692e(10) on this basis. See, e.g., *Gearing*, 233 F.3d at 472 (finding violation of Section 1692e(10) where debt collector filed complaint to collect debt with attached affidavit falsely claiming collector was subrogee of original creditor). The Court thus holds that Delawder states a claim under Section 1692e(10).

[8] Lastly, Delawder claims that Defendants violated Section 1692d by engaging in conduct that had the natural consequence*949 of harassing, oppressing, or abusing Delawder in connection with the collection of a debt. Section 1692d lists several nonexclusive examples of such conduct, including, inter alia, threats of violence, use of obscene or profane language, causing a telephone to repeatedly ring with intent to annoy, abuse, or harass a person, and so forth. See 15 U.S.C. § 1692d. In *Hartman*,

as here, the court considered a plaintiff's claim that the defendants violated various sections of the FDCPA, including Section 1692d, by filing a lawsuit to collect a debt and attaching an allegedly false affidavit to the complaint. See Hartman, slip op. at 16-17. The court held that the filing of a lawsuit or an affidavit is not the kind of conduct intended to be covered by Section 1692d. *Id.* at 17. This Court agrees and therefore holds that Delawder has failed to state a claim under Section 1692d.

3. Defendants' Other Arguments For Dismissal

Defendants make several alternative, non-statutory arguments about why Delawder cannot sustain an action under the FDCPA stemming from Defendants' filing of the Ironton complaint. As noted above, the Supreme Court has already considered and found that the FDCPA applies to litigation conduct. See *Heintz*, 514 U.S. at 294, 299, 115 S.Ct. 1489. Defendants point out that the *Heintz* Court did not expressly address Defendants' arguments. Thus, the Court will briefly explain why it is not persuaded by any of Defendants' other arguments for dismissal.

a. Immunity Arguments:

On the basis of what the Court construes as an amalgam of the doctrines of witness immunity, the litigation privilege, judicial immunity, and immunity under the First Amendment right to petition, Defendants argue that lawyers and their clients are immune from liability for statements made in the course of judicial proceedings. The Court is puzzled by Defendants' assertion that witness immunity is not at issue here. (See doc. # 14, p. 3-4.) Defendants' arguments for immunity in their Motion to Dismiss are based largely on *Etapa v. Asset Acceptance Corp.*, 373 F.Supp.2d 687

(E.D.Ky. 2004), wherein the court found that the doctrine of witness immunity protected the kind of behavior alleged here. See *Etapa*, at 687. If Defendants' arguments are based upon neither witness immunity, nor immunity under state law, which Defendants also discount in their reply brief, the Court is somewhat at a loss as to the basis of much of their argument. Regardless, the Court will address Defendants' arguments based upon some of the cases they have cited.

Though this Court recently addressed the issue of witness immunity and the FDCPA, the Court has found few others cases on point. The Court assumes that Defendants' disavowal of the doctrine of witness immunity is a belated attempt to distinguish this Court's recent decision in *Todd v. Weltman, Weinberg, & Reis, Co., L.P.A.*, No. C-1-03-171, 2004 WL 2827861, at *7 (S.D. Ohio Aug 3, 2004), where the Court held that witness immunity does not bar claims under the FDCPA based upon defendants' filing of defective affidavits in a debt collection suit. As noted above, Defendants cite the unpublished *Etapa* for the contrary proposition. See *Etapa*, at 687; see also *Beck*, 2000 WL 34490402, at *8, 2000 U.S. Dist. Lexis 22440, at *18.

[9][10] The Court declines to follow *Etapa* and *Beck*, and instead agrees with its sister court's opinions in *Hartman* and *Blevins*. In both *Hartman* and *Blevins*, the court found that neither the doctrine of absolute witness immunity nor the litigation privilege barred actions under the FDCPA for statements made in litigation *950 proceedings attempting to collect a debt. See *Blevins*, 395 F.Supp.2d 662 (S.D.Ohio 2004); *Hartman*, slip op. at 7-16. The doctrine of witness immunity is intended to protect the judicial process by protecting witnesses from self-censorship and intimidation. See *Briscoe v. LaHue*, 460 U.S. 325, 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). The rationale for the doctrine does not apply in the context of this case, where only a debt collector can be held liable under the FDCPA, and the "witness" at

issue is that debt collector, who can control his or her own liability by not making knowingly false statements in attempting to collect a debt. The Court thus holds that the doctrine of absolute witness immunity does not bar Delawder's claims relating to the allegedly false affidavit in this case.

Defendants cite *Georgeadis v. County of Fairfield*, No. C2-99-204, 2000 WL 1459418 (S.D.Ohio Sept.25, 2000), for the related proposition that lawyers and their clients are entitled to absolute immunity, deriving from the doctrine of judicial immunity, for statements made in the course of judicial proceedings. Though the *Georgeadis* court did discuss the FDCPA, its discussion of the FDCPA was completely separate from and irrelevant to its discussion of the doctrine of absolute judicial immunity. *Id.* at *2-3. Judicial immunity protects a judge from actions he takes while in acting in his official capacity. *Id.* at *3. The *Georgeadis* court did not extend the doctrine of absolute judicial immunity beyond judges, and neither will this Court.

Defendants cite *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), for the proposition that in interpreting the FDCPA, courts may look to common law precedent on torts related to causes of action under the FDCPA, and that such precedent supports the extension of immunity for litigation conduct under the FDCPA. The Court is not persuaded by Defendants' argument. The *Malley* Court specifically noted that, although a court may look to the common law for guidance in interpreting a statute, a court need not assume that Congress automatically intended to incorporate every common law immunity into statutes that it enacts. *Malley*, 475 U.S. at 340, 106 S.Ct. 1092. Given the broad drafting of the FDCPA and Congress' repeal of the attorney exemption, the Court is not persuaded that Congress intended to incorporate common law immunity into the FDCPA for Defendants' alleged behavior.

Defendants cite a line of cases including *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985), for the proposition that since the First Amendment protects the petitioning activity of filing a complaint, Defendants cannot be held liable under the FDCPA for doing so. First, that case, like other cases finding immunity for petitioning activity under the First Amendment, involved a libel claim, which is not analogous to the case at hand. See *Smith*, 472 U.S. at 480, 105 S.Ct. 2787. Second, in *Smith* itself, the Supreme Court noted the limitations of immunity under the right to petition: "filing a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition.' " *Id.* at 484, 105 S.Ct. 2787 (citations omitted). Thus, even if immunity under the right to petition could be extended to complaints filed under the FDCPA, it would not provide immunity for the conduct alleged here, that is, the filing of a complaint knowing that it was unfounded.FN4

> FN4. The Court also notes that the FDCPA includes an exception for unintentional violations of the FDCPA that are the result of bona fide error. See 15 U.S.C. § 1692k(c), see also Section IV.A.3.c., infra.

*951 Applying any of these immunity doctrines to bar Delawder's claim under the FDCPA would be contrary to the FDCPA's statutory purpose. See *Hartman*, slip op. at 12. The Court thus rejects Defendants' immunity arguments.

b. Commerce Clause Argument

Defendants argue that construing the FDCPA to regulate statements made in the course of state judicial proceedings would violate the Tenth Amendment and exceed Congress'

power under the Commerce Clause. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Defendants argue that applying the FDCPA to attorneys' actions in bringing suit in state court wrongly preempts state regulation over litigation practice and procedure.

[11][12] The First Circuit's opinion in *U.S. v. Bongiorno*, 106 F.3d 1027 (1st Cir.1997), is instructive here. In *Bongiorno*, the court considered the appellant's claim that the Child Support Recovery Act ("CSRA") violates the Tenth Amendment. 106 F.3d at 1033. The court noted that the Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power." See id., citing *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The Court further noted that Congress passed the CSRA pursuant to the enumerated power of the Commerce Clause, and held that consequently, the Tenth Amendment did not apply. *Bongiorno*, 106 F.3d at 1033. The same is true of the FDCPA. Congress passed the FDCPA pursuant to its enumerated power under the Commerce Clause. See 15 U.S.C. § 1692d, see also *Smith v. Steinkamp*, No. IP01-1290-CH/S, 2002 WL 1364161, at *5 (S.D.Ind. May 22, 2002). Thus, the Tenth Amendment does not apply to bar claims like Delawder's under the FDCPA.

[13] Moreover, a Tenth Amendment attack on a federal statute cannot succeed unless the following factors are present: "(1) the statute must regulate the 'States as States,' (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions." *Bongiorno*, 106 F.3d at 1033 (citations omitted). First, the FDCPA does not regulate

the "States as States," or the states at all, but rather the conduct of debt collectors. Second, contrary to Defendants' argument, the FDCPA does not concern attributes of state sovereignty because it does not regulate state court practice and procedure. Finally, the FDCPA does not impair a state's ability to structure its integral operations because it regulates neither state court practice and procedure, nor any other integral operations in areas of traditional state functions. The FDCPA simply regulates the conduct of debt collectors.

Consequently, Defendants' argument regarding the Tenth Amendment and the Commerce Clause is without merit.

c. Bona Fide Error Defense

[14] The Court notes that even though Delawder has stated claims against Defendants, Defendants may not be liable given the bona fide error defense provided in 15 U.S.C. § 1692k(c). Section 1692k(c) provides that a "debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error." The bona *952 fide error defense applies not only to ordinary debt collectors like Platinum Financial, but also to debt collector-attorneys like JB & R and Pavlovic. Courts have freed attorneys from liability under the FDCPA when those attorneys show that they unintentionally violated the FDCPA by asserting in good faith a claim that was later rejected by a court. See, e.g., *Luper*, 74 F.Supp.2d at 764.

Such considerations will be properly explored at the summary judgment phase of this case. At this point, Delawder has sufficiently alleged facts for its claims under 15 U.S.C. § §

1692e(2), 1692f(1), and 1692e(10) to withstand Defendants' Motion to Dismiss.

B. OCSPA Claims

Ohio Revised Code section 1345 makes it unlawful for a supplier to engage in an unfair, deceptive, or unconscionable act or practice in regard to a consumer transaction. Ohio Rev.Code § 1345.02; accord *Hanlin v. Ohio Builders and Remodelers, Inc.*, 212 F.Supp.2d 752, 755 (S.D.Ohio 2002).

1. Defendants as Suppliers

The OCSPA defines a "supplier" as a "person engaged in the business of effecting or soliciting consumer transactions, whether or not he deals directly with the consumer." Ohio Rev.Code § 1345.01(B). Delawder has alleged that Defendants are suppliers under Section 1345.01(C) in that, "subsequent to the consummation of a consumer transaction, defendants engaged in the conduct of attempting to collect a debt." (See doc. # 1, ¶ 23.) Courts have interpreted the OCSPA to apply to the collection of debts associated with consumer transactions. See *Celebrezze v. United Research, Inc.*, 19 Ohio App.3d 49, 50, 482 N.E.2d 1260, 1262 (1984); see also *Schroyer v. Frankel*, 197 F.3d 1170, 1177 (6th Cir.1999). Additionally, courts have interpreted the OCSPA to apply to the collection of debts by attorneys that qualify as suppliers. See *Celebrezze*, 19 Ohio App.3d at 50, 482 N.E.2d at 1262; see also *Schroyer*, 197 F.3d at 1177.

To determine whether Defendants qualify as suppliers under the OCSPA, this Court must find that Defendants continuously or regularly engage in the "business of effecting or soliciting consumer transactions." See *Schroyer*, 197 F.3d at 1177. Thus, for this Court to determine whether

Defendants qualify as suppliers under the OCSPA, this Court must consider specifically the regularity with which Defendants engage in debt collection litigation. See *id.*

[15] As with Delawder's claim that Defendants qualify as debt collectors under the FDCPA, it is unclear from the complaint whether Defendants in fact regularly engage in debt collection litigation so as to qualify as suppliers under the OCSPA. The Court notes, however, that the definition of supplier under the OCSPA is broader than the definition of "debt collector" under the FDCPA. See *id.* Moreover, again, Defendants do not challenge their categorization as suppliers. The Court thus finds that under the liberal pleading standard, Delawder has sufficiently alleged that Defendants are "suppliers" under the OCSPA for purposes of a motion to dismiss.

2. Claims Under Specific Sections

The OCSPA provides generally that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." Ohio Rev.Code § 1345.02(A). Section 1345.02(B) then lists examples of conduct that qualifies as "deceptive" under Section 1345.02(A). Delawder has brought claims under four provisions of Section 1345.02(B).

First, Delawder claims that Defendants violated Section 1345.02(B)(1), which provides that it is a deceptive act or practice *953 for a supplier to represent that "the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have." Second, Delawder claims that Defendants violated Section 1345.02(B)(6), which provides that it is a deceptive act or practice for a supplier to represent that "the subject of a consumer transaction will be supplied in greater quantity than

the supplier intends." Third, Delawder claims that Defendants violated Section 1345.02(B)(9), which provides that it is a deceptive act or practice for a supplier to represent that "the supplier has a sponsorship, approval, or affiliation that the supplier does not have."

Delawder has not directed the Court to any cases sustaining claims under these sections in analogous circumstances, and the Court has found no such cases. The Court does not see how Delawder's allegations could be construed to state a claim under any of these sections and thus GRANTS Defendants' motion to dismiss as to Delawder's claims under Sections 1345.02(B)(1), 1345.02(B)(6), and 1345.02(B)(9).

Lastly, Delawder claims that Defendants violated Section 1345.02(B)(10). Section 1345.02(B)(10) provides that it is deceptive for a supplier to represent that "a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false." The Court has found only two cases addressing a claim like Delawder's under the OCSPA.

The first, by an Ohio appellate court, considered such a claim under Section 1345.02(B) generally. See *Havens-Tobias v. Eagle*, No. 19562, 2003 WL 1601461, at *4-5 (Ohio Ct.App. March 28, 2003). The *Eagle* court considered the plaintiffs' claim under the OCSPA against a lawyer, employed by a debt collector, who filed suit to collect a debt from plaintiffs. *Id.* at *4. The plaintiffs alleged that the lawyer violated the OCSPA by, among other things, misrepresenting his client's legal authority to bring suit. *Id.* The Eagle court affirmed the trial court's dismissal of the claim because documents attached to the complaint showed the attorney was reasonable and not deceptive in bringing the debt collection suit. Nevertheless, the court's discussion of the case implies that an Ohio court would recognize a claim of this kind if the facts

showed the defendant had engaged in deceptive behavior. In the second case, a federal court applying Ohio law did recognize such a claim. See *Hartman*, slip op. at 21. In Hartman, the court held that conduct like that alleged here-filing a complaint to collect a debt and attaching an affidavit misrepresenting the debt collector's legal claim to the debt-states a claim under Section 1345.02(B)(10). Id.

[16] Given the OCSPA's purpose to protect consumers from deceptive acts and practices, and Ohio courts' recognition that debt collection falls within the OCSPA's ambit, the Court believes Ohio courts would recognize a cause of action under Section 1345.02(B)(10) for all deceptive debt collection practices, including a supplier's deceptive lawsuit to collect a debt. This is also consistent with some courts' holdings that a violation of the FDCPA is automatically also a violation of Section 1345.02 or 1345.03. See, e.g., *Becker v. Montgomery, Lynch*, No. 1:02CV874, 2003 WL 23335929, at *2 (N.D.Ohio 2003).

Thus, under the guidance of Eagle, this Court follows the Hartman court and holds that Delawder states a claim under Section 1345.02(B)(10).

3. Defendants' Other Arguments for Dismissal

a. Immunity Arguments

[17][18] Defendants argue that they are immune from Delawder's OCSPA *954 claims under an amalgam of Ohio law, including the absolute litigation privilege and immunity under the Ohio Constitution's petition and speech clauses. The absolute litigation privilege excuses lawyers from being held liable for defamatory or libelous statements made in a lawsuit, where those statements bear a reasonable relationship to the subject of the lawsuit. See *Surace v. Wuliger*, 25 Ohio

St.3d 229, 233, 495 N.E.2d 939, 942-43 (Ohio 1986). Delawder's claims do not involve defamation, and the cases applying the doctrine are not analogous to actions under the OCSPA against attorneys and their clients who are engaging in debt collection litigation. Consequently, this Court agrees with its sister court that "it does not appear that the Ohio courts would apply Ohio's absolute litigation privilege to claims brought under the OCSPA." See *Blevins*, 395 F.Supp.2d 662. Moreover, as noted above, the OCSPA has been applied to litigation activities. See *id.*, at 662, citing *Celebrezze*, 19 Ohio App.3d at 50, 482 N.E.2d at 1262 (debt collector's lawsuit filed in distant county violated OCSPA). Defendants have provided no contrary support for their arguments and the Court is not persuaded by them.

b. Bona Fide Error

The Court notes that the OCSPA also provides a bona fide error defense excusing a defendant from liability if he "shows by a preponderance of the evidence that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error." See Ohio Rev.Code § 1345.11(A). While this provision may ultimately prove relevant, Delawder has stated a claim under Section 1345.02(B)(10) sufficient to survive a motion to dismiss.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss as to Delawder's claims under 15 U.S.C. § § 1692e(5) and 1692d and under Ohio Rev.Code § § 1345.02(B)(1), 1345.02(B)(6), and 1345.02(B)(9), and DENIES Defendants' motion to dismiss as to all of Delawder's other claims.

IT IS SO ORDERED.

United States Court of Appeals, Sixth Circuit.
HERBERT DELAWDER, Plaintiff-Appellee,
v.
PLATINUM FINANCIAL SERVICES CORP., ET AL.,
Defendants-Appellants.
No. 05-3813.

ORDER

BEFORE: COLE, GIBBONS, and ROGERS, Circuit Judges.

(Filed October 2, 2006)

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

15 U.S.C. § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692f

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
> (B) there is no present intention to take possession of the property; or
> (C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District

of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

OHIO REV. CODE, R.C. §1345.02

CONSUMER SALES PRACTICES
Unfair or deceptive acts or practices
(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it

has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;

(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

(C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45 (a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

(D) No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction.

(E)(1) No supplier, in connection with a consumer transaction involving natural gas service or public telecommunications

service to a consumer in this state, shall request or submit, or cause to be requested or submitted, a change in the consumer's provider of natural gas service or public telecommunications service, without first obtaining, or causing to be obtained, the verified consent of the consumer. For the purpose of this division and with respect to public telecommunications service only, the procedures necessary for verifying the consent of a consumer shall be those prescribed by rule by the public utilities commission for public telecommunications service under division (D) of section 4905.72 of the Revised Code. Also, for the purpose of this division, the act, omission, or failure of any officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person.

(2) Consistent with the exclusion, under 47 C.F.R. 64.1100(a)(3), of commercial mobile radio service providers from the verification requirements adopted in 47 C.F.R. 64.1100, 64.1150, 64.1160, 64.1170, 64.1180, and 64.1190 by the federal communications commission, division (E)(1) of this section does not apply to a provider of commercial mobile radio service insofar as such provider is engaged in the provision of commercial mobile radio service. However, when that exclusion no longer is in effect, division (E)(1) of this section shall apply to such a provider.

(3) The attorney general may initiate criminal proceedings for a prosecution under division (C) of section 1345.99 of the Revised Code by presenting evidence of criminal violations to the prosecuting attorney of any county in which the offense may be prosecuted. If the prosecuting attorney does not prosecute the violations, or at the request of the prosecuting attorney, the attorney general may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before grand juries.